



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX: (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX: (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX: (302) 577-6499

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 17-IB61

December 5, 2017

VIA EMAIL

Mr. Craig O'Donnell
craig.odonnell@doverpost.com

Re: November 1, 2017 FOIA Correspondence Concerning the Delaware Emergency Management Agency

Dear Mr. O'Donnell:

I write in response to your correspondence, received on November 15, 2017, alleging that the Delaware Emergency Management Agency ("DEMA") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA"). I treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). We invited DEMA to submit a response to your Petition and received DEMA's response ("Response Letter") on November 20, 2017. For the reasons set forth below, it is my determination that DEMA did not violate FOIA as alleged.

FACTS

On November 7, 2017, you sent a FOIA request to DEMA for: (1) the "Delaware state plan for 1033 program," and (2) the "Dewey Beach PD inventory documents for 2013, 2014, 2015, 2016, 2017." By email dated November 8, 2017, Delaware Department of Safety and Homeland Security ("DSHS") Deputy Secretary Kimberly Chandler sent you the State Plan of Operation ("SPO") between the State of Delaware and the Dewey Beach Police Department. Ms. Chandler also included a link to the Law Enforcement Support Office's ("LESO's") online property management system where the public can view agency inventory. That same day, you responded that you were aware of the LESO spreadsheet but were specifically "looking for the inventory records maintained by the state office for cross checking." You stated: "Unless I'm mistaken, that is required by the MOA and is specifically mentioned in the annual audit reports." Ms. Chandler indicated that she would inquire with DEMA and, on November 14, 2017, sent a follow-up email stating: "We have provided all records responsive to your request. DEMA does not maintain a

separate database. All inventory records are maintained and updated through LESO's website previously provided."

On November 9, 2017, you submitted a second FOIA request to DEMA for the "appropriate justification for excess property requests" for Dewey Beach Police Department for 2017 and "justification to the State on how it will be used for counter-drug [sic], counter-terrorism or border security." You continued: "If the information is maintained on a limited-access online system, please provide printouts of screen shots of the information submitted by Dewey PD." Via email dated November 14, 2017, Ms. Chandler replied that DEMA does not have any records responsive to your request, as the records would be maintained in the federal system.

DISCUSSION

The United States Secretary of Defense is authorized by federal statute to transfer excess Department of Defense ("DOD") property that is suitable for use by law enforcement agencies to state and federal law enforcement agencies.¹ The Secretary's authority to determine what type and quantity of property is suitable for use by law enforcement agencies is delegated to the Defense Logistics Agency ("DLA"). The State of Delaware, through DEMA, is a party to a Memorandum of Agreement ("MOA") that governs the distribution of DOD property to Delaware. DEMA acts as the Governor-Appointed State Coordinator and the DLA operates a Disposition Services LESO to receive and review requests. Records for administration of the LESO program are maintained in an online property management system known as the Federal Excess Property Management Information System ("FEPMIS"). DEMA reviews justifications for LESO equipment submitted by Delaware law enforcement agencies through the FEPMIS. Each law enforcement agency that receives DOD property then enters into a State Plan of Operations ("SPO") with DEMA. However, the current inventory of each law enforcement agency resides in FEPMIS. The inventory is updated in real-time and is viewable at any time via hyperlink.

In your Petition, you appear to challenge DEMA's representations regarding the non-existence of responsive records. Specifically, you allege that "DEMA does in fact maintain records related to the LESO system" and, as such, its "claim that it has no records . . . amounts to a constructive denial." As evidence, you cite to the MOA and argue that, per the MOA, DEMA is required to maintain such records.

In its Response Letter, DEMA maintains that it has provided you all records responsive to your requests. DEMA also states that it "has no records, electronic or otherwise, responsive to [your] request [for historical inventory lists for Dewey Beach Police Department]."² According to DEMA, historical inventories of any given law enforcement agency are not available, as the spreadsheets are real-time.³ DEMA states that it "does not maintain any local database or any

¹ See 10 U.S.C. § 2567a.

² *Id.* at 4.

³ *Id.* at 3.

inventory records outside of FEPMIS”⁴ and argues that FOIA does not require it to create records that do not exist in order to respond to a FOIA request.⁵ Finally, DEMA maintains that any allegation regarding DEMA’s non-compliance with the MOA falls outside the scope of FOIA. DEMA has included a sworn affidavit from its Director, A.J. Schall, who also acts as the State Coordinator of the LESO Program. In his affidavit, Mr. Schall states that records for administration of the LESO Program are maintained in FEPMIS, that DEMA does not maintain any local database or inventory records outside of FEPMIS, and that DEMA has provided true and complete copies of all responsive records within DEMA’s possession.⁶

Under the circumstances, I am satisfied that DEMA has provided you all records in DEMA’s possession or control that are responsive to your requests. As FOIA does not require DEMA to create records that do not exist,⁷ it is my determination that DEMA did not violate FOIA as alleged.⁸

Very truly yours,



LaKresha S. Roberts
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)
Lisa M. Morris, Deputy Attorney General (via email)

⁴ *Id.*

⁵ *Id.*

⁶ Affidavit of A.J. Schall at ¶¶ 5-7.

⁷ “FOIA does not require a public body to create records that do not exist.” *Del. Op. Att’y Gen.* 17-IB32, 2017 WL 3426272 (July 25, 2017) (citing *Del. Op. Att’y Gen.* 15-IB02, 2015 WL 3919061, at *2 (June 17, 2015)).

⁸ The question of whether the State is in compliance with the MOA falls outside the scope of FOIA.